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In the Supreme Court of the United States

OCTOBER TERM, 1940

J. E. PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 833

J. E. PIERCE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 347–351) is reported in 115 F. (2d) 399.[1]

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 15, 1940 (R. 345–346), and a petition for rehearing (R. 353) was denied Feb-

[1] The opinions of the District Court and of the Circuit Court of Appeals in connection with petitioner's first trial are reported in 13 F. Supp. 301 and 86 F. (2d) 949, respectively.

ruary 4, 1941 (R. 355). The petition for a writ of certiorari was filed March 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioner's motion for a directed verdict was properly overruled.

2. Whether the trial court erred in refusing to give a instruction requested by the petitioner.[2]

STATUTE INVOLVED

Section 32 of the Criminal Code, as in force at the time of the offenses charged in the indictment (U. S. C., Title 18, Sec. 76), provided:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department or any officer of the Government *thereof,* and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department or any officer of the Government *thereof,* any money, paper, docu-

[2] Petitioner also presents but reserves for argument if certiorari is granted the question whether the indictment was sufficient. On this point, see the opinion of the Circuit Court of Appeals on petitioner's appeal from his first conviction, 86 F. (2d) at p. 951.

ment, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both.[3]

STATEMENT

Petitioner and another were indicted in 1935 in the District Court for the Western District of Tennessee on twenty-one counts, twenty of which charged violations of Section 32 of the Criminal Code and one of which charged conspiracy. They were convicted on seventeen of the substantive counts. On appeal to the Circuit Court of Appeals for the Sixth Circuit the judgment of conviction was reversed because of prejudicial misconduct of the prosecutor. *Pierce* v. *United States,* 86 F. (2d) 949. At the second trial petitioner's co-defendant was acquitted and the jury was unable to agree on a verdict as to petitioner (see R. 347).

At the third trial, the one here involved, the petitioner was convicted on fifteen counts of the indictment (R. 12–13). Counts 2, 4, 9, 11, 14, 16, 18, and 20 charged that on various dates between May 21, 1935, and June 11, 1935, the petitioner, with intent to defraud eight named individuals, falsely as-

[3] Section 32 was subsequently amended by the Act of February 28, 1938, c. 37, 52 Stat. 82, which added, after the first italicized word "thereof," the phrase "or under the authority of any corporation owned or controlled by the United States," and after the second italicized word "thereof," the phrase "or any corporation owned or controlled by the United States." U. S. C., Supp. V, Title 18, Sec. 76.

sumed and pretended to be an officer of the United States, to wit, a representative of the Government selling TVA[1] units, and did act as such. Counts 5, 10, 12, 15, 17, 19, and 21 charged that the petitioner, while acting in such pretended character, obtained from seven of the individuals named sums ranging from $10 to $25 (R. 1–11).

Petitioner was sentenced on the fifteen counts as follows: Three years' imprisonment on Counts 2, 4, 5, 9, and 10, to run concurrently; three years' imprisonment on Counts 11, 12, 14, 15, and 16, to run concurrently with each other, but consecutively to the three-year-period on Counts 2, 4, 5, 9, and 10; two years' imprisonment on Counts 17, 18, 19, 20, and 21, to run concurrently with each other, but consecutively to the three-year-period on Counts 11, 12, 14, 15, and 16 (making a total of eight years' imprisonment); and to pay a fine of $250 on each of the fifteen counts (R. 13–14). On appeal, the Circuit Court of Appeals for the Sixth Circuit unanimously affirmed the judgment of conviction (R. 345–351).

The Government's evidence, which consisted principally of the testimony of persons who were solicited by the petitioner, may be summarized in broad outline as follows:

In May, 1935, petitioner contacted one Reau Graves, a garage man in Gibson County, in western Tennessee, and asked him to recommend someone

[1] The initials "TVA" will be used throughout this brief to refer to the Tennessee Valley Authority.

who was well acquainted in the community and knew everybody. When Graves offered his own services, petitioner hired him to act as a guide, stating that he (petitioner) was working for the Government in the interest of the TVA and desired to call on the better class of farmers. Graves accompanied petitioner for two days, calling on about a dozen persons a day and answering petitioner's questions about each prospect before the call (R. 37–40).

Most of the Government witnesses testified that petitioner would greet them cordially, complimenting them on their farms or residences (R. 24–25, 38, 43, 66, 73, 108, 116, 120), and then inform them that he was representing the Federal government selling TVA "Units" at $10 each, the purpose being to raise money in the various counties in order to bring power lines into their territory, thereby resulting in cheaper electric power for those counties. The money was to be raised by subscriptions of citizens for these TVA "Units", and petitioner stated that each subscription would be matched "dollar for dollar" by the Government (R. 24–25, 43–44, 52, 59, 66, 73–74, 84, 91–92, 101–102, 107–109, 116, 120–121, 131–132). Most of the witnesses testified that petitioner told them he was representing the Government in the interests of the TVA, selling "Units" (R. 32–33, 43, 47–48, 73, 91, 101, 108, 113, 116, 118, 131), while some stated that he informed them he was representing the TVA (R. 59, 72, 84, 123, 127). However, it is apparent from their

testimony that all of the witnesses were led to believe that petitioner was a bona fide Government official authorized to sell "stock" of that agency. Most of the persons approached, because of their proximity to TVA operations, were interested in TVA and the extension to their community, through it, of the benefits of cheap power (R. 25, 43–44, 47, 52, 66, 78, 84, 108, 120), and were therefore easily persuaded to purchase one or more "Units" at $10 each (R. 24–26, 44, 52, 60, 66, 74, 84, 92, 102, 109, 121, 132). There was testimony that some of those solicited were told that they could not delay in making their payments because petitioner had to send the money and a daily report to Washington every night (R. 25, 61, 132).

Several witnesses said that petitioner told them he was well acquainted with President Roosevelt and had gone to school and grown up with him (R. 27, 31, 74, 110, 117, 131). Petitioner had with him a letter of introduction signed by the president of the Huntsville, Alabama, Daily Register (R. 35–36), a newspaper of which petitioner was vice president and editor (R. 35, 135). One witness testified that petitioner handed him this letter and stated that it was a credential identifying him as a Government representative (R. 81–83); while two witnesses testified that petitioner, without showing it to them, read excerpts from the letter and stated or intimated that it was a letter of introduction signed by President Roosevelt (R. 34–45, 131–133).

While some of the purchasers paid cash for "Units" which they bought from petitioner (R. 38, 44, 60, 84), the majority paid by check. Petitioner had blank checks of various local banks (R. 38) and the procedure obtaining in practically all cases was that when a prospect agreed to buy, petitioner would produce a check of the proper bank, fill it in, and the purchaser, who was either busy at the time or trusted in his belief that the petitioner was a Government official, would sign it without noticing to whom it was made payable (R. 52–53, 66–68, 74–75, 92–93, 98–99, 100–103, 109, 121, 129, 132).[5] While the checks in those cases bore on their face the words "For advertising" in petitioner's handwriting, three of the witnesses stated positively that those words were not on the checks when they signed them (R. 67, 92–93, 122). The purchasers were also given receipts which were usually folded when handed to them by petitioner and which were not read by the purchasers until later (R. 45, 53, 60, 68, 73, 75, 84, 93, 102, 109, 122, 132). When the receipts were finally read by the purchasers, after the petitioner had left, they saw that such receipts bore the name of the Daily Register and realized that what they had actually purchased was advertising space in that newspaper (R. 54, 60–61, 68, 73, 75–76, 93, 96, 102–104, 122, 129–130); and some of the witnesses thereupon stopped or attempted

[5] While the record does not show the payees of all the checks, in each instance where the payee is identified such payee was the Huntsville Daily Register (R. 37, 73, 98, 103).

to stop payment of their checks (R. 68, 103, 129–130).

There was also testimony that, during the sales transactions, petitioner had in his possession copies of the Daily Register and other documents which he and his co-defendant displayed and handled in such a manner that the purchasers thought that they dealt with the TVA or that the Register was a TVA publication (R. 40, 56–57, 59, 67–68, 101, 108, 110, 113–115, 125–126). Most of the witnesses received a few copies of the paper after making their purchases (R. 52, 54, 61, 68, 76, 85–86, 94, 122).

None of the witnesses, prior to their payments, understood that they were subscribing to or buying advertising space in a privately owned newspaper (R. 33, 48, 52, 61, 68, 75–76, 85, 94, 102–104, 109, 115, 122, 126, 132).

There was testimony that after making a sale, petitioner would not remain long in the presence of the purchaser (R. 36, 53, 60, 65, 73, 84, 88–89, 102), one witness stating that as soon as petitioner received his $10 he "made a break for the car and that aroused my suspicions," that petitioner "had to run to get in the car * * * and Roach [the co-defendant] had the car started," and that when the witness called to petitioner to give him his address, the petitioner said that it was on the receipt (R. 60–61). Graves, the guide, testified that petitioner would cash checks at various gasoline stations as soon as he received them (R. 38). One Govern-

ment witness, who sought to stop payment of his check, learned that it had been presented to the bank within an hour after he signed it (R. 129–130).

The Assistant Coordinator of the TVA testified that that agency is a corporation but is not a stock company and does not issue any stock or units for sale to the public (R. 89–91); and it was stipulated that petitioner was not at any time an agent, employee, or representative of the Government, any department thereof, or the TVA (R. 91).

ARGUMENT

I

Petitioner contends that the trial court erred in overruling his motion for a directed verdict. He asserts that the Government's evidence was so uncertain, conjectural, and inconclusive that it did not make out a case for the jury (Pet. 12).

While concededly, because of the two previous trials and the attempt to discredit witnesses by reference to their former testimony, some confusion and contradiction resulted, we submit that the evidence heretofore summarized (*supra* pp. 4–9) fully justified the Circuit Court of Appeals in holding that there was substantial evidence inconsistent with the petitioner's claim of innocence. We think that that court correctly appraised the evidence when it said (R. 348):

> If appellant's witnesses were to be believed, appellant had simply engaged in an exten-

> sive sale of advertising space in a newspaper published in Huntsville, Alabama, for the purpose of promoting, through community cooperation, as appellant put it, rural development of counties whose residents purchased advertising, and appellant was not responsible for the contrary impressions of the government's witnesses. On the other hand, if the government's witnesses were to be believed, appellant had capitalized upon his prospects' natural interest in the objectives of the Tennessee Valley Authority by leading them to believe he, as representative of the United States Government, was raising money from private individuals to be matched by government contributions for the purpose of hastening development of the Tennessee Valley Authority and insuring extension of its benefits to their respective communities.

With reference to petitioner's criticism that Government witnesses were unable to state with precision the words and actions of the petitioner which were relied upon to establish his impersonation of a Federal officer (Pet. 12–13, 27), it suffices to say, as the Circuit Court of Appeals pointed out, that a witness who, after a lapse of four years, could recount all of the details surrounding an event "would be either a genius or unworthy of belief" (R. 349).

Petitioner asserts that the Government's evidence showed no more than mere verbal declarations by petitioner that he was a Federal officer,

and that this was not enough under the statute (Pet. 32–35). It is apparent, however, from the Government's evidence that petitioner not only declared himself to be a Government officer, but took it upon himself to act in that assumed capacity. Of course, as was stated by the court below on petitioner's first appeal (86 F. (2d) at p. 951), it was not necessary, as the petitioner seems to insist (Pet. 35), to constitute a violation of the statute, that there be exhibited some badge or other insignia of Federal office.

We submit, therefore, that the Circuit Court of Appeals correctly held that the petitioner's motion for a directed verdict was properly overruled.

II

The petitioner contends (Pet. 23–26) that the trial court erred in refusing to give the special instruction requested by him set forth at R. 308, to the effect that officers and employees of the TVA were not within the scope of the statutory provisions involved, and therefore that any claim or representation by the petitioner that he was representing the TVA did not constitute a violation of the statute.

It is asserted by the petitioner that it was the theory of the prosecution that the petitioner by representing himself to be an officer or employee of the TVA, without more, violated the statute; that nowhere in its charge did the trial court point

out that it was not sufficient, to constitute an infringement of the statute prior to its amendment (*supra*, pp. 2–3), for the petitioner merely to have falsely assumed to act as an officer or employee of the TVA; and that no distinction having been made in the charge between impersonating an officer of the TVA and the impersonation of Government officers, the jury was permitted to find the petitioner guilty on evidence which went no further than to show that petitioner claimed to represent the TVA.

Preliminarily, it should be pointed out that, contrary to petitioner's repeated assertions, the Government's case was not based upon the theory that officers and employees of the TVA are officers and employees of the Government and that petitioner violated the statute merely because he pretended to be an officer or employee of the TVA. Each count of the indictment (R. 1–11) charged the petitioner with having assumed and pretended to be an officer of the United States, to wit, a representative of the Government selling TVA Units. And the evidence heretofore summarized (*supra*, pp. 4–9) abundantly established that the petitioner, by words and acts, held himself out as "an officer acting under the authority of the United States Government."[8] There is consequently no occasion

[8] The trial court, in summarizing in its charge, the case on behalf of the Government said (R. 304):

> The Government alleges that the defendant claimed or represented that he was an officer acting under the au-

to discuss the abstract question, raised by the petitioner, whether the statute prior to its amendment in 1938 applied to the impersonation of officers and employees of the TVA.[7]

With respect to the refusal of petitioner's requested instruction, a perusal of the trial court's charge readily discloses that the court adequately dealt with the proper effect to be given to evidence of claims or representations by the petitioner that he was acting for the TVA. Not only did the court twice read (R. 295, 299–300) the entire statute to the jury—once at the request of the petitioner—and repeatedly caution the jury that it could not find the petitioner guilty unless the evidence established beyond a reasonable doubt that petitioner impersonated a Federal officer (R. 301, 302, 303, 304, 305), but it specifically charged that (R. 306):

> In this connection the Court further instructs the jury that reference to the TVA

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thority of the Government of the United States and as such officer, sold or attempted to sell TVA Units.

[7] In its opinion on the petitioner's appeal from his first conviction, the Circuit Court of Appeals, in disposing of petitioner's legalistic contention that officers and employees of the TVA were not within the purview of the statute prior to its amendment, said (86 F. (2d) at p. 951):

> The allegations of the indictment are broader than the contention implies, and to the allegations the proofs respond. The defendants were not charged with representing themselves as agents or employees of the Tennessee Valley Authority. They are charged with having assumed or pretended to be representatives of the government.

> in copies of the Huntsville Daily Register, exhibited by the defendant to any person, from whom funds were solicited, *and in the sales talks made by him*, to such person should not be considered by you as evidence of a false claim or pretense of Federal Authority on the part of the defendant, Pierce, *unless you further find and are satisfied from the proof, beyond a reasonable doubt, that such reference to TVA, in either the newspapers or sales talks, were made by the defendant with the intent of producing a belief on the part of the person from whom funds were solicited that he, the defendant Pierce, was acting as an officer or employee of the Federal Government.* [Italics ours.]

It is therefore evident that the jury was adequately advised that mere representations by the petitioner that he was acting for the TVA would not alone constitute a violation of the statute; that it was necessary that the jury find in addition that by such representations the petitioner was in fact pretending and assuming to act as an officer of the Government. This was the most to which the petitioner was entitled. Clearly any claim or representation by the petitioner that he represented the TVA was a violation of the statute if he meant thereby to convey and did convey the impression that he was an officer acting under the authority of the Federal Government. The instruction sought by the petitioner was not so qualified and therefore did not adequately state the law. Petitioner was amply

protected by the trial court's charge against being convicted on the basis of any claim or representation by him that did not go so far as to induce the belief that he was acting as an officer of the Government.

CONCLUSION

The case was correctly decided below, there is no conflict of decisions, and there is involved no important question of Federal law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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